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CHARLES ELMORE CROPLEY

Supreme Court of the United States

October Term 1944.

No. 1168

ALBERT C. DULANEY, Petitioner,

versus

M. COPPARD, Trustee, Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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OPINIONS OF THE LOWER COURTS.

The Findings and Conclusions of the Referee are shown in the Record at pages 21-27.

By Stipulation, the Order of the District Judge for the Western District of Texas, San Antonio Division, sustaining the Referee, is not shown in the Record. (R. p. 24).

The opinion of the Circuit Court of Appeals for the Fifth Circuit, affirming the judgment of the District Court, is reported in 145 F. 2d 468.

BRIEF STATEMENT OF THE CASE.

This was a voluntary bankruptcy. (R. p. 22). At the First Creditors' Meeting, the Referee fixed December 10, 1942, as the time for filing objections to bankrupt's discharge. (R. p. 23). Because no books or records were produced by the bankrupt at the First Creditors' Meeting, Respondent, Trustee, filed application for further examination under Section 21(a) of the Bankruptcy Act, and on the same date, after hearing, an order granting said application was entered fixing November 23, 1942, as the date for commencement of such examination. (R. p. 23).

On the latter date, in response to subpoena duces tecum, the bankrupt produced a mass of miscellaneous records, cancelled checks, deposit slips, check stubs, corporate records, files and books covering a money-lending and investment business, dating back about eleven (11) years. And, on December 10, 1942, the time originally fixed for filing objections to bankrupt's discharge, the Trustee and his attorney, without benefit of accounting or auditing assistance, were examining these records, and had not as yet determined whether to oppose the discharge of the bankrupt. (R. p. 9). As yet there are no assets in the estate of bankrupt.

Respondent vehemently denies that funds or property involved have been so tied up as to cause any person to suffer for lack of same; but, on the other hand, the record shows that the bankrupt withheld funds from alleged beneficiaries, when demanded, before bankruptcy. (R. p. 15 bottom).

The order extending time was entered on December 9th, 1942, the day before the last date fixed for filing objections.

RESPONDENT'S FIRST COUNTER-PROPOSITION.

AN ORDER OF THE REFEREE, APPLIED FOR BY CREDITOR OF BANKRUPT, EXTENDING TIME ORIGINALLY FIXED FOR FILING OBJECTIONS TO BANKRUPT'S DISCHARGE, WHICH TIME EXPIRED WHILE SECTION 21(a) EXAMINATION OF BANKRUPT BEFORE REFEREE WAS IN TEMPORARY RECESS, BUT WITHOUT GIVING BANKRUPT NOTICE OR OPPORTUNITY TO BE HEARD IN OPPOSITION THERETO, WAS NOT A DENIAL OF DUE PROCESS TO BANKRUPT UNDER THE CIRCUMSTANCES.

(In answer to Assignments of Error Numbers 2, 3, 6, 7, 8, 9 and 10 Petitioner's Direct and Concise Brief pages 7 and 8).

AUTHORITIES.

Bankruptcy Act as amended in 1938, Section 14(b);

Bankruptcy Act as amended in 1938, Section 58(b);

Rules of Civil Procedure for the District Courts of the United States, Section 6(b);

Bankruptcy General Order XXXVII;

1938 Collier-Bender Pamphlet Edition, Bankruptcy Act, page 51;

In Re: Bryant, 188 F. 530.

ARGUMENT.

Section 14(b) of the Act specifically contemplates that extension of time for making such objections may be granted by the court.

Section 58(b) of the Act, 11 U. S. C. A., Section 94(b), covering notices, provides only for notice to creditors, the Trustee, any United States Attorney, of the last date fixed for filing objections to the bankrupt's discharge. This Section, however, does provide for notice to the bankrupt of the time and place for hearing upon such objections.

Rules of Civil Procedure, Section 6(b) made applicable by Bankruptcy General Order XXXVII, provides that in its discretion, and without notice or motion, the Court may extend time for doing any act required to be done within a specified time, if application therefor is made before the expiration of the period originally prescribed, or if extended by a previous order.

Eighteen (18) days had lapsed between November 23, 1942, the date bankrupt was compelled to produce his books, and December 10, 1942, the date fixed for opposing the discharge.

The Trustee and his attorney had not had sufficient time to examine the mass of evidence produced in court and complete the examination of the bankrupt on his multifarious transactions. The court was in temporary recess on December 10, 1942, to afford the Trustee and his attorney an opportunity to partially inspect such records. (R. p. 3).

Creditors, usually living at distant points, are the ones foreclosed by expiration of time for filing objections. The Act contemplates that notice to them of such time is the paramount consideration. The bankrupt has not yet been denied his discharge.

The bankrupt cited no case, holding on similar facts, that due process had been denied. Respondent has been unable to find any.

Had the discharge been denied without notice or hearing, a substantial right would have been involved; the matter here complained of is procedural.

The Referee's own knowledge of the facts were sufficient "cause shown".

The lapse of time which has ensued has been due to the very detailed, extensive and necessary investigation of the bankrupt's affairs made by Respondent, and to the time consumed by these appellate proceedings.

RESPONDENT'S SECOND COUNTER-PROPOSITION.

A CREDITOR MAY APPLY FOR EXTENSIONS OF TIME FOR FILING OBJECTIONS TO DISCHARGES OF BANKRUPTS WHENEVER CIRCUMSTANCES REQUIRE.

(In answer to Assignment of Error Number 4, Petitioner's Concise Brief, page 7).

AUTHORITIES.

Bankruptcy Act, 1938 Amendment, Section 47(a) 9;

Bankruptcy Act, 1938 Amendment, Section 14(b);

Bankruptcy Act, 1938 Amendment, Section 58(b);

In Re: Levy, 127 F. 2d 62, (3rd Cir.);

In Re: Massa, 133 F. 2d 191, (2nd Cir.);

In Re: Weedemeyer, 32 F. S. 809, (D. C. E. D. N. Y.).

ARGUMENT.

Were the above proposition incorrect, the inclusion of the requirement in Sections 14(b) and 58(b) of the Act that creditors be notified of the time within which the bankrupt's discharge must be opposed, would be meaningless.

This is a no-asset case. Section 47(a) 9 of the Act, makes it the Trustee's duty to "oppose at the expense of the Estate the discharges of bankrupts", only "when they deem it advisable to do so". Thus,

the duty is discretionary with the Trustee, and in no-asset cases such as this (R. p. 9) seemingly, the Trustee has no duty to oppose at all. The Trustee has the privilege, but not the exclusive right, to oppose discharges. It is a privilege also enjoyed by creditors.

RESPONDENT'S THIRD COUNTER-PROPOSITION.

A CREDITOR OF THE BANKRUPT, HAVING THE RIGHT TO OPPOSE THE BANKRUPT'S DISCHARGE, MAY PETITION FOR AN EXTENSION OF TIME IN WHICH TO DO SO, THOUGH SUCH CREDITOR HAD NOT PREVIOUSLY PARTICIPATED ACTIVELY IN THE PROCEEDINGS.

(In answer to Assignments of Error Numbers 1 and 5, Petitioner's Concise Brief, pages 6-7).

AUTHORITIES.

Collier on Bankruptcy 14th Edition, Vol. 2, p. 274, Sec. 2106;

Beaven vs. Stuart, 250 F. 972, 41 A. B. R. 81; Cert. Den. 246 U. S. 676; 38 S. Ct. 426, 62 L. Ed. 933;

Re: Rose, 19 A. B. R. 169, D. C. Pa;

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Re: Dockins, 107 F. 33, 7th Cir.;

Re: Ruhlman, 279 F. 250, 2nd Cir.;

Remington on Bankruptcy, Section 3208.

ARGUMENT.

The above authorities amply support the rule that although a scheduled creditor's claim had not been filed or allowed the Creditor may still oppose the bankrupt's discharge or obtain an examination under Section 21(a).

The Dockins and Ruhlman cases and Remington on Bankruptcy, Section 3208, cited above, hold that a creditor who had not filed his claim may, nevertheless, oppose the discharge.

In the instant proceeding, the creditor's claim had been filed and allowed by the Referee, before the creditor petitioned for the extension of time.

RESPONDENT'S FOURTH COUNTER-PROPOSITION.

REFEREES IN BANKRUPTCY ARE NOT DISQUALIFIED TO ACT IN ANY CASE IN WHICH THEY ARE NOT DIRECTLY OR INDIRECTLY INTERESTED.

(In answer to Assignment of Error Number 11, Petitioner's Concise Brief, page 8).

AUTHORITIES.

Remington on Bankruptcy, Vol. 2, Section 595;

Bankruptcy Act as amended in 1938, Section 29(c);

Bankruptcy Act as amended in 1938, Section 39(b);

Re: Strobel, 155 F. 692, D. C. N. Y.;

Re: Abbe Press, 134 F. 51, Cert. Den., 196 U. S. 42; 49 L. Ed. 631, 25 Sup. Ct. 797;

Reiser vs. Woodruff, 112 F. 2d 652, 654; 10 Cir. 1940;

Re: C. W. Bartleson Co., 243 F. 1001;

Re: Fox West Coast Theatres, 88 F. 2d 212;

Re: Battani, 6 F. S. 378.

ARGUMENT.

The above authorities, generally, hold that the Referee is not disqualified to enter an order, the result of which may bring money into the Estate of the bankrupt, and thus, indirectly, result in the payment of commissions to him.

Bankruptcy Act Section 39(b) reads as follows:

> "Referees shall not act (1) in cases in which they are directly or indirectly interested."

While Respondent has found no case directly so holding, it is submitted that this Section applies to situations in which the Referee has a personal interest, direct or indirect, by reason of dealings

with or relationship to the bankrupt existing prior to the adjudication, or to a situation personal to the Referee, arising after bankruptcy constituting a direct or indirect interest, which might disqualify him, other than his prospective commissions.

Remington on Bankruptcy, Volume 2, Section 595, page 71 cites Tumey vs. State of Ohio, relied on by petitioner, as authority for the proposition that there must be a direct financial benefit resulting to the official from his act.

Certainly, no direct or indirect benefit could or would result to the Referee by virtue of the extension order complained of. The Tumey case does not sustain the proposition here urged by the petitioner.

Moreover, as stated in the Battani case, above, the Tumey case and other like cases, were criminal matters.

If the contention made by the petitioner were good law, the Referee would be, to a large extent, disqualified from functioning in almost every case in which there were assets, or where orders entered by the Referee resulted in bringing assets into the estate.

Were the petitioner's contention upheld, the Bankruptcy Act in large part would be overturned. Masters in Chancery likewise would be disqualified,

because of indirect and resultant compensation for their services, even though their reports are advisory.

All acts of the Referee are subject to Review by the District Judge, and at hearing before that court, on review, additional testimony may be called for by the court.

The Bankruptcy Act is not perfect. And it would be better if the measure proposed in Congress before the War started, placing Referees on a salary basis, were enacted into law. But experience has shown, however, that Referee's, generally, are men of highest integrity and scrupulous honesty.

Moreover, Bankruptcy Act Section 29(c) makes it an offense for a Referee to act in any case in which he is directly or indirectly interested. The last statement is from Remington on Bankruptcy Volume 2, Section 595, page 71.

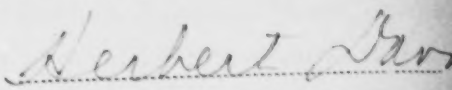
CONCLUSION.

In conclusion, Respondent submits that the overall picture in this case is such, as that there has been no denial of due process to the bankrupt under the circumstances here presented, and that this appeal is but an attempt by the bankrupt to obtain his discharge on technical grounds in the prospect, thereby,

of avoiding the gauntlet of the formal hearing in opposition to his discharge.

This case was correctly determined by the Circuit Court of Appeals, and the petition for Writ of Certiorari is without merit and should be denied.

Respectfully submitted,



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